Reply Brief for Plaintiff in Error.

In the Supreme Court of the United States.

No. 291.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

versus

THE CITY OF RICHMOND AND THE CHESAPEAKE & OHIO RAILWAY COMPANY,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

On behalf of the Plaintiff in Error, we beg to submit in reply to brief for defendants in error, the following:

FIRST. It cannot be true as contended that, in order to raise a Federal question, and thus secure jurisdiction here, the declaration should have alleged in terms the deprivation of the constitutional right now contended for.

In the multitude of cases in which this Court has had under review the question of jurisdiction, not a single case is cited, nor can one be cited, where it has been held that the plaintiff's bill or declaration must set forth as a

ground of relief the fact that he has been deprived of his property without compensation or without due process of law. The cases all say, as Mr. Justice Harlan said in *Railway Co.* vs. *Chicago*, 166 U. S., 226, 231: "It is sufficient if it appears from the record that such right was specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

The declaration made the ordinance of the city, which deprived the plaintiff of his property, a part of it, so that the court could see for itself that no provision for compensation or for process before it did the act complained as a deprivation of his property. Whether such ordinance was amenable to the fourteenth amendment was a *conclusion of law*, and one of the cardinal, and even elementary, rules of pleading is that conclusions of law need never be pleaded.

The statement *ad arguendum* in the brief that the motion made on January 31st, relied on to give jusisdiction, "was an afterthought" is without the slightest foundation. Is it not more reasonable to presume that two motions to set aside the judgment were made, (one on the usual and general ground that it was contrary to the law and the evidence, and the other "solely on the ground that the Act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city of Richmond, so far as it authorised the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void because in conflict with the fourteenth amendment of the Constitution of the United States. Rocord p. 21), in order more pointedly to present the constitutional question? Not only did the trial Court pass on this last motion, but one of the errors assigned in the petition for appeal, presented to the Court of Appeals, expressly set out this ruling of the trial Court as error, for which its judgment should be reversed. See Record p. 8, 9.

The declaration, after alleging the ownership of the lot described, alleged that the defendants did, under the au-

thority of an ordinance, unlawfully close Eighth Street, and did unjustly and unlawfully allow the Richmond and Alleghany Railroad Company, of which the Chesapeake and Ohio Railway Company was the successor, to erect sheds and fences across said street, which obstructed the free use of the same as a highway, whereby the plaintiff was greatly damaged in having his property depreciated in value. The only answer to these damaging charges was a demurrer to the declaration, which of necessity presented the question whether the ordinance was a lawful and constitutional exercise of the powers vested in the Council, viz: whether such an ordinance which closed a street was valid without proper provision for process against the persons specially injured by the proposed act, and also without proving compensation for damages, etc.

There is excellent authority for the proposition that the construction of a railroad in a public street, without providing compensation to the persons injured thereby, is *ipso facto* the taking of private property for public use. *Mahon* vs. *N. Y. C. R. R. Co.*, 24 N. Y., 660; *Keley* vs. *Kansas City*, 69 Mo.; *Fortwood* vs. *Crawford*, 8 A. and E. Cor. Cases, 406; and *Strange* vs. *Dubuque*, 62 Ia., 303.

And this Court in *Balto. & Pot. R. R. Co.* vs. *Fifth St. Bap. Ch.*, 108 U. S., 317, 331, said:

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

SECOND. The cases relied on to show that the presentation of the Federal question came too late in this case do not sustain the contention of counsel.

Bushnell vs. *C. M. & S. Co.*, 148 U. S., 682 holds that

"A Federal question suggested for the first time in a petition for a rehearing, after judgment in the highest court of a State, is not properly raised so as to authorize this court to review the decision of that court." To the same effect, exactly, is the case of *Butler* vs. *Gage*, 138 U. S., 52.

While the case of *Loeber* vs. *Schroeder*, 148 U. S., 580, held that after the case had been once appealed to the State court of Appeals and sent back to the lower court and there again decided, it was then too late to present a Federal question. There is surely no analogy in these cases to the one at the bar.

Nor are counsel any more fortunate in citing the recent case of *Kipley* vs. *Illinois*, 170 U. S., 182, for there the determination of the court denying the jurisdiction rests upon the fact that the motion to amend the answer was not placed upon the ground that a Federal question was thereby sought to be set up; and even, if such was the intention of counsel, the record did not show that the ruling of the court in denying the amendment was excepted to. Here the record shows that the motion was made *solely* on the ground of the denial of Federal rights and the denial of the motion was excepted to and the ground for the motion and the reason for the exception are set out both in the order of the court and the bill of exception. Record pp. 20–21.

THIRD. It is not contended by the counsel for the plaintiff in error, as counsel for defendants in error seem to think, that there can be any recovery here for damage done by closing the street, if the city was acting "within the scope of its powers," and exercising such powers in a constitutional way.

The gravamen of the plaintiff's case was that the council of the city in passing the ordinance had transcended its authority, and had undertaken to appropriate private property without due process of law, or compensation for those damaged.

We nave no complaint against the Virginia cases cited

by the learned counsel (*Smith* vs. *Alexandria, Kehrew* v. *Richmond* and *H. B. & C. Co.* vs. *Roanoke*), for they are in no wise in conflict with our contention, for in all of these cases, and many others of the like kind, the municipal corporation was held not liable, because, in the act complained of, the city was *improving the streets, not devoting them to the exclusive use of a private corporation as in this case, and thereby depriving the public of their use and by that act injuring in a special way the plaintiff.*

Nor do we challenge the proposition stated on page 17 of the brief. that "A municipal corporation, if the authorisy is given it by the Legislature, has a right to make any use of a street which it may see fit, and the damage will be *damnum absque injuria*, so far as the lot-owner is concerned, *provided no one of the rights peculiar to him as the owner of the lot is taken away.*" Our contention was and is that our client was within the saving of the proviso, for the injury described in his declaration is peculiar to him and that any enactment, ordinance or law that deprived him of his right, or of an opportunity to establish such right, is void because unconstitutional.

But we do challenge the proposition, also contended for, certainly in the narrow sense in which counsel applies it, that all damages, in order to be recognized as *special*, must be directly traceable to the deprivation of one of three things, viz: *light, air or access.*

A practical illustration reduces this narrow view to an absudity. Let it be thus illustrated: The planting of so harmless an obstruction as a sign post in the street by a private corporation under authority of the city, which encroached one inch in front of another's lot would be, it is admitted by opposing counsel, a ground for suit, because there would be special damage, but the erection of an impassable barrier across a street only one inch away from a person's line, whereby public travel along a street was diverted and store property isolated, would not occasion spe-

cial damage though the value of such person's lot was thereby practically destroyed.

We cannot accept so irrational and illogical a conclusion, or believe that this court will recognise it. The courts in England, where the proposition was once accepted, have long ago repudiated it. See cases cited in opening brief, pp. 17-18.

It is true that some of the ablest courts in this country have undertaken to draw a hard and fast line in order to determine this question, but others equally able have taken the other view. The cases favorable to our view are cited and commented upon in our opening brief, and we need not here repeat these citations.

This court has but recently held that in estimating damages in condemnation proceedings, "the *profitableness* of the business was undoubtedly a matter to be considered." *A. Bachus, Jr.*, vs. *Fort Street U. Depot Co.*, 169 U. S., 557, 574.

Is it not paradoxical to say that such damages as "profitableness" of a business conducted on a lot located near to property taken, may be considered in condemnation proceedings, and yet the "profitableness" of a business may be injured without redress, in cases where the legislative agencies have failed or refused to provide process or proceedings necessary to secure compensation?

On this precise point, we beg to call the attention of the court to the charge in the plaintiff's declaration. It is there alleged that "the plaintiff, his tenants, agents, servants, and all others, on foot, in carriages, wagons, and other vehicles, had free access and approach to said messuage and premises from the direction of Canal street and so back again at all times of the year at their will and pleasure, yet the said defendants, well knowing the premises, to-wit: on the day and year aforesaid, wrongfully and unjustly placed divers fences and other structures across the said highway known as Eighth street at a point, to-wit: two hundred and fifty-one feet south of Cary street and —

feet north of the face of the north wall of the old canal, which fences and other said structures obstructed and closed the said highway and prevented the plaintiff, his tenants, agents, servants, and others, from having the free use of said highway as he and they might otherwise have had, and by means of the premises the plaintiff has also from thence hitherto been deprived of the use of his said store and dwelling upon said messuage and of large gains, profits, benefits, and advantages in the way of rent which he might and otherwise would have acquired from the said stores and dwellings, to-wit: of the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is greatly diminished to a great extent, to-wit: to the sum of two thousand dollars, and whereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use, and enjoyment of said messuage and premises, and has been and still is by means of the premises otherwise greatly injured and damnified."

FOURTH. In reply to the contention made by the learned counsel on the other side that the absence from the Virginia Constitution of the word "damaged" makes a world of difference in the determination of this case, we wish to remark (1) that the plaintiff in this honorable court is insisting on an infraction of his constitutional rights under the Federal Constitution and not under the State Constitution, and (2) that this court has settled once for all in the great case of *Pumpelley* vs. *Green Bay Company*, 13 Wall. 166, 179, *that the serious interruption to the common and necessary use of property is equivalent to the taking of it*, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. In that case, great and far-reaching principles were discussed and settled by a great and broad-minded judge. It is a wonder that the learned counsel should have attempted to resurrect the argument buried, as it was, under the weighty words of one of the three greatest of the great de-

parted judges of this, the greatest of courts. Mr. Justice Miller thus consigned the argument to oblivion :

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, and placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

But grant that the city is "charged with the duty of closing streets," just as much as it is charged with the duty of "opening streets." Yet it will not be contended that it could legally pass an ordinance opening a street without providing process against, and compensation to the persons whose property would be taken. So it cannot close a street without like provision to protect persons whose property is taken in the constitutional sense, that is damage; for it is undoubtedly the law of the land, and specially of the State of Virginia, that "once a highway always a highway," and not even the Legislature can take away the right of access to and user of without compensation. Elliott on Roads and Streets, sec. 658; *Taylor's Case*, 29 Gratt., 793; *Bunting* vs *Danville*, 92 Va., 200.

Said the Court of Appeals of New York, discussing the property rights of persons in the highway: "Any law which destroys property, or its value, or takes away any of its essential attributes, deprives the owner of his property," *Lohr* vs. *Mt. Eler R. Co.*, 101 N. Y,, 286.

FIFTH. While it is true that we fell into error in describing the exact location of the lot of this plaintiff, yet it is equally true that this is but a test case, for there are three other suitors whose properties are likewise located on the same square—namely: James Marano, Dr. H. Wythe Davis and A. Meyer, and the facts are substantially the same in all of the cases and the principles are identical, so that this suggestion of counsel can have no bearing upon the case.

In conclusion, we wish to say that while the city ef Richmond is nominally the defendant to this suit, yet it cannot be seriously affected by its determination for the ordinance allowing the closing of the street and the building of the obstruction therein protects its interest by the following provision:

"Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of any one being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injnries." Record, p. 18.

Respectfully submitted,

HENRY R. POLLARD.